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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

JOHN A. THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Whether Petitioner was denied his constitutional right, under the Sixth Amendment, to confront the witnesses against him, where the two child witnesses against petitioner were permitted to testify, at trial, facing the judge with their backs to and located forty feet from petitioner, and where the judge-ordered arrangement necessitated petitioner's counsel, in order to be able to see the faces of the witnesses as they testified, to be seated fifty-five feet from petitioner, which arrangement prevented petitioner from conferring with his counsel during the testimony of the child witnesses?

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No.

JOHN A. THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, John A. Thompson, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in this case on September 25, 1990.

OPINIONS BELOW

The United States Air Force Court of Military Review issued its decision in this case on August 4, 1989. That decision is reported at 29 M.J. 541 (A.F.C.M.R. 1989) (*en banc*) and is reproduced as Appendix A to this petition. The decision of the United States Court of Military Appeals, affirming the Court of Review's decision is reported at 31 M.J. 168 (C.M.A. 1990) and is reproduced as Appendix B to this petition.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. sec. 1259(3) (Supp. 1989) and 10 U.S.C. sec.

867(h) (Supp. 1989). The judgment of the United States Court of Military Appeals was entered on September 25, 1990.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

STATEMENT OF THE CASE

The petitioner, an Air Force sergeant (E-4), was tried on February 8-10, 1988 by a military judge sitting alone as a general court-martial. Contrary to his pleas, he was convicted of sodomizing his two stepsons and assaulting one of them, in violation of the Uniform Code of Military Justice Articles 125 and 128, 10 U.S.C. sec. 925 and 928, respectively. He was sentenced to, *inter alia,* confinement for thirty years. At trial, the military judge permitted the two child victims to give their testimony, about beatings and acts of sodomy by appellant, while seated in a chair placed between the judge and petitioner. The chair's location prevented the children from seeing the appellant during their testimony. Moreover, it precluded appellant from seeing the faces of the children as they testified. While the Court of Military Appeals described the courtroom as small, 31 M.J. at 172, it was approximately 18 feet wide and 60 feet long. In fact, the prosecutor described it as being "like a hallway." In this long hallway, the witness stand was approximately 35 to 40 feet away from the defense table.

In arriving at his decision to permit the witnesses to face away from petitioner, the military judge never questioned the witnesses. Instead, the witnesses' psychologist was called to testify regarding the ability of the children to confront the petitioner. The military judge, in overruling the defense objection to the placement of the witness stand in a manner that precluded the witnesses from confronting the appellant, found:

> One, such a [sic] arrangement will not have any effect on the Court with regard to the presumption of innocence of the accused;
>
> Two, that the arrangement proposed by trial counsel is in no way obtrusive and certainly not comparable with the arrangements in *Coy v. Iowa* cited by defense counsel;
>
> Three, the accused and witnesses will be in the same room with no barrier between them and the fact that the witnesses will not be facing the accused will not deprive the accused of his right to confrontation;
>
> Four, considering the testimony concerning the trauma to the children if forced to testify facing the accused, and balancing that factor against the accused's alleged right to have witnesses facing him, I find the procedure proposed by the trial counsel will not prejudice the rights of the accused and will insure the witnesses testify freely.

Ultimately, the arrangement of the witness stand vis-a-vis the petitioner's chair allowed him to hear the testimony of the witnesses, but prevented face-to-face confrontation.

Another point raised by defense counsel, in his objection to the placement of the witness stand in the manner set forth above, dealt with counsel's isolation from the petitioner during the testimony of the children. Because of

the placement of the witness chair, counsel had to place himself at the end of the courtroom, approximately 55 feet away, opposite the petitioner so that counsel could observe the faces of the witnesses during their testimony. This placement rendered defense counsel and petitioner isolated from one another and without communication between them during the course of testimony of the children. The military judge did state, however, that he would permit a recess after direct testimony of the children so that defense counsel could confer with petitioner.

The Air Force Court of Military Review issued its decision without the benefit of this Court's decision in *Maryland v. Craig*, 497 U.S. ____, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). The Court of Military Appeals, however, affirmed petitioner's conviction, measuring the procedure employed here against the standards established in *Craig*. *Thompson*, 31 M.J. at 172.

REASONS FOR GRANTING THE WRIT

In rendering its decision in this case the three concurring opinions, comprising the *Opinion of the Court*, attempted to force the facts contained within the record into the standards announced by the majority of this Court in *Craig*. *See Thompson*, 31 M.J. at 172. In brief, the Court of Military Appeals opined that the children "understood the solemnity of the oath;" the petitioner had the opportunity to cross examine the witnesses; the judge was able to observe the demeanor of the witnesses; and, "most importantly both the military judge and the Court of Military Review specifically found that the procedure utilized to protect the children was *necessary*." *Id.*, at 172-73 (emphasis supplied by the court). A close examination of the Court of Military Appeals' decision in this case reveals that the judicial process employed amounted to little more

than a review of the sufficiency of the evidence to establish that the *Craig* standards had been met.

Petitioner submits that the decision by the Court of Military Appeals failed to take into account several critical differences between the facts presented in his case and those of *Craig*. It is because of those differences and their effect upon the fundamental fairness of the proceedings against petitioner, that a **writ of certiorari** should be issued to permit this Court to delineate the "minimum showing of emotional trauma required" before denying a criminally accused individual their Sixth Amendment right to face-to-face confrontation. This question was expressly left unanswered in *Craig*. *Id.*, 110 S.Ct. at 3169.

The trauma necessary to justify denying a criminally accused his Sixth Amendment right to confront the witnesses against him is trauma that "would make it impossible for the child to communicate." *Craig*, 110 S.Ct. at 3174 n.1 (Scalia, J., dissenting). This standard emerges from the fact that the only issue of law before the Court was the standard under the Maryland statute and "any implication beyond that would in any event be dictum." *Id.* The majority's opinion in *Craig*, clearly sets forth that it need not determine the minimum showing of trauma required because "the Maryland statute [Md. Code, Courts and Judicial Proceedings, sec. 9-102(a)(1)(ii)] require[d] a determination that the child witness [would] suffer 'serious emotional distress such that the child cannot reasonably communicate'." *Craig*, 110 S.Ct. at 3169. Notwithstanding the decision of the Court of Military Appeals in this case, that degree of trauma was clearly not shown.

Rather than calling the children to ascertain whether they would be unable to communicate or suffer serious emotional trauma, the military judge simply called the boys' psychologist to testify regarding the matter. The Air Force Court of Military Review decision, 29 M.J. 541,

clearly sets forth the testimony of the children's psychologist as to why the special procedure was necessary. The psychologist testified that generally "[t]here's a great deal of anxiety and it's easy to be distracted by what is in your line of vision rather than to be able to respond to the questions that are asked." 29 M.J. at 544. The psychologist continued that "their being in the direct line of vision with the defendant will impair their ability to talk about their experiences and to actively think about the questions that they're responding to." *Id.* The most telling response of the psychologist and the most relevant under the standard contained in *Craig,* is that the boys would "not 'adamantly refuse to participate in the proceedings'," *Id.*, even if they had been required to testify face-to-face with petitioner.

The findings of the trial judge clearly reflect that the emphasis was upon the children testifying "freely," rather than insuring that the children testified truthfully. *See, Id.* at 545 (quoting the military judge's finding that the procedure would "insure the witnesses testify freely").[1] The Court of Review's decision in this case also hinged, at least in part, upon the speculative finding by the military judge that the mental capabilities of the boys *might* be blocked by testifying face-to-face with petitioner. *Id.* All of the speculation and possibilities do not constitute a probability, let alone a determination, that the "child witness *will* suffer serious emotional distress such that the child

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[1] In *Coy v. Iowa,* 487 U.S. 1012, 1020, 108 S.Ct. 2798, 2801 (1988), Justice Scalia set forth that the emphasis is necessarily upon insuring that the witness testifies truthfully, not that he has an easier time testifying. In fact, "[t]hat face-to-face presence may, unfortunately, upset the truthful rape victim or abused child . . ." is a cost of the protections afforded a defendant under the Sixth Amendment. Thus, the fact that a witness may testify more freely or more easily, is not a legitimate basis upon which to deny face-to-face confrontation.

cannot reasonably communicate." Thus, the standard set forth in *Craig* was not met.

A second consideration, and another distinction between the facts of the instant case and *Craig,* relates to the effect upon the defense counsel's ability to communicate with his client during the testimony of the witness. The facts in *Craig* clearly show that despite the witness and defense counsel being in a separate room from the accused "[t]he defendant remain[ed] in electronic communication with the defense counsel . . . as if the witness were testifying in the courtroom." *Craig,* 110 S.Ct. at 3161.

In contrast in the instant case, defense counsel expressly informed the military judge that a major concern with the arrangement of the witness chair was that it rendered him, petitioner's counsel, unable to communicate with his client while the witnesses testified. In effect, the defendant was forced to choose between the presence of counsel at the defense table, thereby facilitating communication with counsel, or having a defense representative placed in such a manner that the witnesses' demeanor could be observed as the witnesses testified. The testimony of the victims in this case clearly was a critical point in the trial. In fact, "[i]t is difficult to perceive a more critical stage . . . than the taking of evidence on the defendant's guilt." *Perry v. Leeke,* ____ U.S. ____, 109 S.Ct. 594, 603 (Marshall, J. dissenting) (quoting *Green v. Arn,* 809 F.2d 1257, 1263 (6th Cir. 1987)). While the defendant and his counsel were permitted to recess to discuss the witnesses's testimony, the fact remains that petitioner was forced to choose between passing information to his counsel during the victims' testimony or having his counsel observe their demeanor during their testimony. *Cf. Simmons v. United States,* 390 U.S. 377 (1968).[2]

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[2] In *Simmons,* the petitioner was faced with the dilemma of either invoking his Fifth Amendment right to remain silent or testifying

There is still another aspect of the courtroom arrangement, in the case *sub judice,* which distinguishes it from the facts presented in *Craig.* In *Craig,* even though the defendant and witnesses were in separate rooms, there was a camera which permitted the defendant to observe the demeanor of the child witnesses. In the instant case, no such arrangement was made. Thus, the nonverbal communication, whether actions, expressions or the absence thereof, which a parent or person familiar with the witness understands and can explain to counsel were left unidentified, misunderstood or simply ignored. *Cf. Coy v. Iowa, supra.,* 487 U.S. at 1019 (finder of fact permitted to draw own conclusions regarding a witness who looks studiously elsewhere during testimony).

It is the combination of all of these distinguishing facts that make the instant case unlike *Craig.* Admittedly, appellant was denied a face-to-face confrontation with the witnesses against him. Under *Craig,* however, there is exception. That exception is not applicable in the case *sub judice.*

First, the exception announced by the Court in *Craig* was for those situations where the child would suffer "serious emotional distress such that the child could not reasonably communicate." The findings in the instant case are that the children would be able to testify more freely if they did not have to testify facing petitioner. No finding that the children would have been unable to testify face-to-face with petitioner was ever made.

Second, in *Craig* the accused was in constant communication with his counsel during the testimony of the isolated

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during a suppression hearing in support of his Fourth Amendment claim. Justice Harlan, delivering the opinion of the Court stated, "we find it intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* 390 U.S. at 394.

witness. In the instant case, throughout the testimony of the children, with the exception of a recess, petitioner was precluded from conferring with his counsel. The length of this denial does not amount to the prohibition of counsel conferring with an accused overnight which was imposed by the judge in *Geders v. United States*, 425 U.S. 80 (1976). At the same time, however, it obviously was more egregious than was the judge's prohibition in *Perry v. Leeke*, ____ U.S. ____, 109 S.Ct. 594 (1989) where the accused and counsel were prohibited from speaking during a fifteen minute recess while petitioner was testifying.

Finally, in *Craig*, even though the witness was in a separate room, the accused was able to observe the witness in much the same manner as she would have had the witness testified in the court room. *Also see United States v. Batten*, 31 M.J. 205 (C.M.A. 1990) (child abuse victim testified in court behind screen, but accused able to watch victim testify via closed circuit television). In contrast here, throughout the children's testimony, petitioner was unable to see the expressions on the faces of the witnesses and unable to observe their mannerism. In other words, appellant heard his accusers, but, in effect, never observed their testimony because of the arrangement of the witness chair.

The combination of all of these facts results in the conclusion that the instant case more closely resembles the facts presented by *Coy*, rather than the facts of *Craig*. Furthermore, it is the cumulative effect of these decisions by the judge which vitiated petitioner's Sixth Amendment right to confront the witnesses against him. *Cf. Berger v. United States*, 295 U.S. 78 (1935) (probable cumulative effect upon jury of pronounced and persistent prosecutorial misconduct could not be disregarded as inconsequential).

In *Coy*, this Court established that denial of Confrontation Clause rights is subject to harmless error analysis. *Id.*,

487 U.S. at 1021. This harmless error analysis is necessarily strict. Where an error impacting upon an accused's constitutional rights is found, reversal is required unless the reviewing court can "declare a belief that [the error] was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1986). Under the standard of *Coy* the "assessment cannot include consideration of whether the witness's testimony would have been unchanged, or the [fact finder's] assessment unaltered, had there been confrontation." *Coy*, 487 U.S. at 1021. Thus, the impact of error must be measured in terms of whether, excepting the testimony in question, would the accused nevertheless have been found guilty of the offense beyond a reasonable doubt. This beyond a reasonable doubt standard, in turn, necessitates that a reviewing court find that there was no possibility that the error affected the decision of the fact finder. *See Milton v. Wainwright*, 407 U.S. 371 (1972); *Schneble v. Florida*, 405 U.S. 427 (1972); *Kotteakos v. United States*, 328 U.S. 750 (1946).

The other evidence in the instant case may or may not have constituted sufficient evidence to prove petitioner's guilt beyond a reasonable doubt. *See, Thompson*, 31 M.J. at 174 (Sullivan, J. concurring). Whether the remaining evidence was sufficient, however, is not properly the issue. The question "is whether there is a reasonable possibility that the evidence complained of might have attributed to the conviction." *Fahy v. Connecticut*, 375 U.S. 85 (1963). The Court of Military Appeals has recognized the true question in such cases as well. *See United States v. Batten*, 31 M.J. 205 (C.M.A. 1990); *United States v. Hogan*, 20 M.J. 71 (C.M.A. 1985) (the question is not whether the remaining evidence is sufficient to convict; but whether the accused would have been convicted if the fact finder had no knowledge of the inadmissible evidence).

In the instant case, the affected testimony was that of the victims. Their testimony was offered on the ultimate issue in controversy. Their testimony was not a single statement, but instead comprised the crux of the prosecution's case against appellant. *Compare, United States v. Batten,* 31 M.J. at 211 (a single accusatory statement by the victim that the judge expressly did not rely on in arriving at his findings). In short, the testimony of the two victims was the evidence upon which the petitioner was convicted. Furthermore, the mere fact that the testimony of the victims may have been "cumulative", *Thompson,* 31 M.J. at 174 (Sullivan, J. concurring), is not dispositive of the absence of harm to petitioner. *See Harrington v. California,* 395 U.S. 250 (1969) (In expressly reaffirming *Chapman v. California, supra.*, the Court clarified: "We do not suggest that, if evidence bearing on all the ingredients of the crime is tendered, the use of cumulative evidence, though tainted, is harmless error." *Id.*, at 288). Thus the placement of the victims, who testified facing away and forty feet from petitioner, in such a position as to force petitioner to choose between having counsel within conference distance or placed so as to be able to observe the demeanor of the witnesses, effectively prevented petitioner from observing their testimony. Under the facts of the instant case, the courtroom arrangement constituted prejudicial error because it denied Sergeant Thompson his Sixth Amendment right to confront the witnesses against him.

CONCLUSION

Petitioner was denied his Sixth Amendment right to confront the witnesses against him. The authority for denying this Sixth Amendment right was a misapplication of this Court's decision in *Maryland v. Craig*. The facts of this case present the Court with the opportunity to address the question left unanswered in *Craig, i.e.* what is the minimum degree of emotional trauma that justifies denying an accused his right to a face-to-face confrontation with the witnesses against him. Accordingly, the petitioner submits this case warrants examination by this Court. Therefore, the petition for Writ of Certiorari should be granted.

Respectfully submitted,

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DECEMBER 1990

APPENDIX A

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

ACM 26797

UNITED STATES

v.

SERGEANT JOHN A. THOMPSON, FR 222-58-405,
UNITED STATES AIR FORCE

Sentence Adjudged 10 Feb. 1988

Decided 4 Aug. 1989

Accused, sergeant, United States Air Force, was convicted by general court-martial, Kirtland Air Force Base, New Mexico, Stephen R. Bloss, J., of three specifications of sodomy with child under 16 years old and one specification of assault, and he appealed. The United States Air Force Court of Military Review, Murdock, J., held that sodomy victims could be permitted to testify in presence of accused, but with their backs to him.

Affirmed.

Lewis, Senior Judge, filed dissenting opinion.

Appellate Counsel for the Appellant: Colonel Leo L. Sergi, Colonel Richard F. O'Hair, Major Deborah A. Baker, and Captain William E. Boyle.

Appellate Counsel for the United States: Colonel Joe R. Lamport; Lieutenant Colonel Robert E. Giovagnoni; Lieutenant Colonel Morris A. Tanner, Jr.; and Major Terry M. Petrie.

Before HODGSON, HOLTE, FORAY, MICHALSKI, LEWIS, BLOMMERS, KASTL, MURDOCK and PRATT,
Appellate Military Judges, En Banc.

DECISION

MURDOCK, Judge:

The appellant was tried by a military judge sitting alone as a general court-martial. Contrary to his pleas, he was found guilty of three specifications of sodomy with a child under 16 years old, and one specification of assault. The sodomy specifications were based on misconduct with his two stepsons, and the assault was based on misconduct against his wife. He was sentenced to a dishonorable discharge, confinement for 30 years, total fordeitures, and reduction to airman basic.

We will discuss the appellant's two asserted errors in reverse order. He asserts he was denied a speedy trial. We adopt the trial judge's findings on this issue and hold that he was not denied a speedy trial. R.C.M. 707(c)(1)(A) and 707(c)(3); *United States v. Palumbo,* 24 M.J. 512 (A.F.C.M.R.1987); *United States v. Jones,* 21 M.J. 819 (N.M.C.M.R.1985).

In his other assertion of error, the appellant has objected, both at trial and on appeal, to the method used to protect the young victims from having to face him during their testimony. He asserts that he was denied his right to confront witnesses because the children were permitted to testify with their backs toward him. We find no error in the procedure.

During the pendency of this appeal, the United States Supreme Court decided *Coy v. Iowa,* 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988), which reversed an Iowa decision allowing children to testify from behind a darkened screen.

Our legal system has traditionally had different procedures for child witnesses. For example, traditional common law rules of witness competency limited the extent to which courts could rely on child testimony. However, these rules have undergone a "process of piecemeal revision by statutes for over a century, so that today most of

the former grounds for excluding a witness altogether have been converted into mere grounds for [impeachment]". *McCormick's Handbook of the Law of Evidence*, 2d Ed, Sec. 61. (1972). Other procedures have attempted to reduce the negative impact of court proceedings on sensitive child witnesses. For example, a number of jurisdictions allow use of video tape or television systems to capture the testimony while allowing the child to avoid sitting in the courtroom. *See Coy*, at 108 S.Ct. 2804 (O'Conner, J., concurring).

The growing importance of child testimony has forced the courts and legislatures to rethink some of the traditional approaches to child testimony. Prosecution of child abuse relies heavily on child testimony. Reported instances of this sad offense are increasing and there is often little evidence beyond the injuries and the child's testimony. Many states have mechanisms for protecting child victims and child witnesses from the full rigor of a courtroom trial. *See Coy*, at 108 S.Ct. 2804 (O'Conner, J., concurring). These mechanisms include allowing videotaping children's testimony for use at trial later, using hearsay exceptions to admit statements from absent children, authorizing closure of the courtroom, and using closed-circuit television. *See, Note, To Keep the Balance True: The Case of Coy v. Iowa*, 40 The Hastings Law Review 437 (1987) (discussion of state action in this area).

The present case represents one attempt to respect the special concerns of dealing with child witnesses while providing a criminal accused with all required protections. The two child witnesses in this case were the appellant's stepsons. They were 12 and 10 years old at the time of trial. Before the boys were called to testify, the defense counsel notified the judge that he was concerned about the prosecution's plan to rearrange the courtroom so that the appellant could not see the witness' faces. The trial counsel confirmed that he intended to request the unusual court-

room arrangement. When the changes were finally approved and completed, the witnesses sat facing the judge with their backs to the appellant. The defense counsel was allowed to sit near the judge's area so he could see the witness' faces.

Before approving it, the military judge conducted an extended discussion with both counsel about this seating plan. As we mentioned earlier, at the time of this trial, the United States Supreme Court had not yet issued their decision in *Coy*. Previously, the Iowa Supreme Court had upheld Coy's conviction for engaging in lascivious acts with a child. The two teenage female victims in *Coy* had testified from behind a glass partition which blocked their vision of the defendant while allowing him to view them dimly. *State v. Coy,* 397 N.W.2d 730 (1986). Unlike the present case, *Coy* involved a recently enacted statute which allowed a screen to be erected without a judicial determination of the need for such protection.

In the United States Supreme Court opinion, Justice Scalia, writing for the Court, held that the Confrontion Clause of the Sixth Amendment "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." The Court stated that "[i]t is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter [than the use of the screen in Coy's case]". *Coy v. Iowa,* 487 U.S. 1012, 108 S.Ct. 2798, 2802, 101 L.Ed.2d 857 (1989).

The Court left undecided whether there were any exceptions to the requirement for a literal face-to-face confrontation. The Court stated:

> [o]ur cases suggest, however that even as to exceptions from the normal implications of the Confrontation Clause, as opposed to its most literal application, something more than the type of generalized finding underlying such a statute is needed when the exception is not 'firmly. . . rooted in our jurisprudence.'

> [citations omitted]. The exception created by the Iowa statute, which was passed in 1985, could hardly be viewed as firmly rooted. *Since there have been no individualized findings that these particular witnesses needed special protection,* the judgment here could not be sustained by any conceivable exception.

The present case differs from *Coy* in two key respects. First, there is no statute or regulation mandating a particular courtroom arrangement for child witnesses or child victims. Second, the military trial judge made an extensive inquiry into the need for special protections before he approved the plans for allowing the children to testify with their backs to the appellant.

We will turn to the absence of statute or regulation first. A trial judge's actions in directing arrangements of the courtroom are, in general, well within his discretion as presiding officer of the court-martial. R.C.M. 801(a) and (c); *See United States v. Hershey,* 20 M.J. 433 (C.M.A.1985) (closure of courtroom in some cases); *United States v. Johnson,* 15 M.J. 518 (A.C.M.R.1983) (moral supporter allowed to sit near child witness). We hold that the trial judge did not abuse his discretion by authorizing an unusual seating arrangement.

That leaves the more difficult question of whether the inquiry made by the trial judge was sufficient to justify allowing the witnesses to testify without actually confronting the appellant face-to-face. Justice O'Conner, joined by Justice White, wrote a concurring opinion in *Coy* which we find helpful. She stated that an appellant's rights under the Confrontation Clause were "not absolute but rather may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony." 108 S.Ct. at 2803. She continued:

> In short, our precedents recognize a right to face-to-face confrontation at trial, but have never viewed that

> right as absolute. I see no reason to do so now and would recognize exceptions here as we have elsewhere.
>
> Thus, I would permit use of a particular trial procedure that called for something other than face-to-face confrontation if that procedure was necessary to further an important public policy. [citations omitted]. The protection of child witnesses is, in my view and in the view of a substantial majority of the States, just such a policy. The primary focus therefore likely will be on the necessity prong. I agree with the Court that more than the type of generalized legislative finding of necessity present here is required. *But if a court makes a case-specific finding of necessity, as is required by a number of state statutes, [citations omitted] our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses.* Because nothing in the Court's opinion conflicts with this approach and this conclusion, I join it.

108 S.Ct. at 2805 (emphasis added).

We agree. In the present case, the trial judge made specific inquiry and findings about the need to protect child witnesses from facing the appellant directly.

During the inquiry, the trial counsel called a psychologist to testify about her knowledge of the witnesses and the impact face-to-face testimony might have on them. She testified that she had counselled with the children every two weeks for about eight months before the trial. She stated that the boys had "a great deal of anxiety and fear about participation in [the] proceedings" and had

> spontaneously talked with me last week about their fear of being in the courtroom with Mr. Thompson,

> and talked about a fear that they might even be attacked by him in the courtroom. The boys enter these proceedings having stated a great deal of anxiety and shame and fear about participation. Attempts have been made to help them to modulate that fear and to provide them with feelings of greater safety in being in this room and participating in the proceedings. However, both of the children will have difficulty in talking about their experience that they have identified in terms of being in a more public setting and being in front of strangers and for them to be in direct line of vision with defendant in this case, I think, would tend to block their ability to respond and to think about the questions. There's a great deal of anxiety and it's easy to be distracted by what is in your line of vision rather than to be able to respond to the questions that are asked. I think that their being in the direct line of vision with the defendant will impair their ability to talk about their experiences and to actively think about the questions that they're responding to.

When the trial counsel asked the psychologist about turning the witness chair so the children's backs would be to the appellant, she responded:

> I think that that would lessen their anxiety and would be less likely to produce blocks in their intellectual capacity to respond to questions if they do not have Mr. Thompson in their direct line of vision.

On cross-examination, the psychologist stated that she did not think the boys would "adamantly refuse to participate in the proceedings". Trial counsel then asked whether their anxiety level would be so high as to "block" their "articulation of anything that happened" if they were to testify face-to-face. She replied:

> Yes, Michael in particular has a stuttering problem that increases when he is anxious and anxiety is such an over-whelmingly strong emotion that it blocks intellectual function, so that if you raise the anxiety level of someone, it's normal for intellectual, the ability to intellectually think about something, to be shut off. And I think that their ability to respond to questions with their full recollection would be impaired by that situation.

She added that her opinion was not based solely on the nature of the crimes alleged, but also on the boys' relationship with the accused. She concluded by admitting that "in general" she would prefer any of her child clients to be allowed to testify without having to face the accused.

After considering the testimony and arguments on the motion, the trial judge issued his findings. We find them to be fair. He found:

> The defense has objected to the prosecution's proposal that [the children] testify not from the witness stand but while seated in a chair facing the witness stand and the military judge. This position is indicated by the letter "C:" on Defense Exhibit C [should be Defense Exhibit W]. Trial counsel has presented evidence through Linda Ann Sweeney Frawly [the psychologist] that the children if required to testify from the witness stand where they would be looking directly at the accused would hve their ability to think and testify accurately impaired and that they could respond better if the accused were not in their direct line of sight, and I find by a preponderance of the evidence that that's a fact.
>
> I further find that:
>
> One, such a [sic] arrangement will not have any effect on the Court with regard to the presumption of innocence of the accused;

> Two, that the arrangement proposed by trial counsel is in no way obtrusive and certainly not comparable with the arrangements in *Coy v. Iowa* cited by defense counsel;
>
> Three, the accused and witnesses will be in the same room with no barrier between them and the fact that the witnesses will not be facing the accused will not deprive the accused of his right to confrontation;
>
> Four, considering the testimony concerning the trauma to the children if forced to testify facing the accused, and balancing that factor against the accused's alleged right to have witnesses facing him, I find the procedure proposed by the trial counsel will not prejudice the rights of the accused and will insure the witnesses testify freely.
>
> The objection is therefore overruled.

The military judge's inquiry was adequate to satisfy *Coy* and to justify the particular steps taken to accommodate the fears of the child witnesses in this case. We are not indicating our advance approval of every situation in which witnesses testify with their backs to the accused, even where there is an inquiry into the necessity for such a procedure. *Coy* holds that the general rule is to the contrary. When exceptions are found, the military judge will, undoubtedly, have conducted a careful inquiry into the reasons for the proposed seating arrangement. That inquiry will have satisfied the judge that there are compelling reasons for changing the traditional witness seating arrangement. A thorough inquiry would probably include an *in camera* interview by the judge with the witnesses who might need the special arrangement. This procedure would allow the judge to evaluate the testimony of any experts who have testified about the need for protections.

In the present case, the information presented to the judge indicated that the witnesses were young and frightened of testifying. The psychologist testified that their fright was not just a generalized stage fright, but was also a fear of being physically attacked by the appellant. Many witnesses may harbor a fear of being attacked for their adverse testimony, but these children had already been repeatedly beaten by the appellant during his commission of the offenses for which he was being tried. Their fear was based on their actual knowledge of the physical harm he was capable of inflicting. The psychologist also testified that both boys, and particularly the younger one, were likely to be so confounded by facing the appellant directly that their mental capabilities might be blocked, rendering them incapable of testifying.

We are also concerned that in such a stressful situation child witnesses might eventually lie in order to end the session and relieve the stress. *See Coy* at 108 S.Ct 2809 (Blackmun, J., dissenting). This might happen with any witness, but particularly with a child witness where the accused is a parent or one standing *in loco parentis*. The North Carolina Supreme Court expressed our concerns well:

> Sexual activity between a parent and a minor child is not comparable to sexual activity between two adults with a history of consensual intercourse. The youth and vulnerabilty of children, coupled with the power inherent in a parent's position of authority, creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose.

State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673, 681 (1987). We quoted *Etheridge* and expressed similar concerns in *United States v. Torres*, 27 M.J. 867 (A.F.C.M.R. 1989).

There is a good possibility that screening a child from a related accused, or one standing *in loco parentis,* might facilitate obtaining truthful testimony rather than encourage falsity. If confronting the accused is designed to encourage truthful testimony, surely a child testifying about a related accused, or one standing *in loco parentis,* will feel the presence of the accused when they are in the courtroom together, even when they are not facing them directly. When this presence is coupled with the opportunity for the fact-finder and the defense counsel to observe the child's demeanor directly, and the opportunity for the accused to observe all but the facial expressions of the witness, we believe the accused's rights have been properly protected.

The United States Court of Military Appeals mentioned *Coy* in a recent case involving the admissibility of an out of court statement. *United States v. Hubbard,* 28 M.J. 27 (C.M.A.1989). In our view, the present case is distinguishable. *Hubbard* did not involve either child witnesses or a procedure for screening the witnesses. The discussion of *Coy* in *Hubbard* was primarily in the context of whether admitting an out of court statement violated Hubbard's right to confrontation and does not appear to have been intended to announce a rule for use in all cases.

We hold that under the circumstances of this case, the military judge was correct in allowing the children to testify in the presence of, but not facing, the appellant. After examining the record of trial, the assignment or errors, and the government's reply thereto we have concluded that the findings and sentence are correct in law and fact and that no error prejudicial to the substantial rights of the accused was committed. Accordingly, the findings of guilty and sentence are

AFFIRMED.

Chief Judge HODGSON, Senior Judges FORAY and KASTL, and Judges HOLTE, BLOMMERS, and PRATT concur.

Judge MICHALSKI participated in oral argument but not in the decision in this case, Judge HOLTE participated in both oral argument and the decision.

Senior Judge LEWIS (dissenting):

I conclude that the military judge erred in allowing the two victims to testify with their backs to the appellant. Under the circumstances of this case, I am not satisfied beyond a reasonable doubt that the error was harmless. *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710-711 (1967). *See United States v. Brooks,* 25 M.J. 175, 180 (C.M.A. 1987). I would set aside the findings of guilty of Charge I and the Specifications thereunder (alleging acts of sodomy committed against the appellant's stepsons) and the sentence and authorize a rehearing. I would not preclude the prosecution from resubmitting a motion to shield the child witnesses from eye-to-eye contact with the appellant so that the evidence presented in support thereof might be evaluated in light of the Supreme Court's guidance in *Coy v. Iowa.*

Another View of Coy v. Iowa: What did the Plurality Hold?

The majority have premised the decision today on their best estimate of what some future majority of the Supreme Court might recognize as the proper balance between the emotional interests of child sexual abuse victims at trial and the Sixth Amendment right of criminal accuseds to confront their accusers. Support for recognition that these competing interests may be balanced can be found in a concurring opinion of two of the eight Justices who participated in *Coy.* I believe it is appropriate that one of us examine *Coy* from the perspective of the plurality opinion

authored by Justice Scalia with the concurrence of three others. The message of the plurality in *Coy* is that the balance has already been struck, and decisively so, in favor of an accused's right to a face-to-face confrontation with prosecution witnesses. It is commendable that we champion concerns for the child victims who are subject to the trauma of the trial process. However, if we elevate these concerns to a position of superiortiy to an accused's Sixth Amendment rights, we are fashioning a very tenuous construction of constitutional law.

Whether or not we find it palatable to acknowledge it, the plurality in *Coy* accepted as a necessary consequence the probability that certain truthful witnesses will experience anxiety and trauma when required to testify under the direct gaze of those whom they accuse. Justice Scalia observed: "That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child, but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs." 108 S.Ct. at 2802. It is inconceivable that this position was reached precipitously and without any thought of the special place that child witnesses have come to occupy in our criminal trial processes. The bottom line of *Coy* is that this consideration does not enjoy any special recognition when it conflicts with an accused's ability to face his accusers at trial. Whether, in the context of confrontation, the special needs of child witnesses enjoy any measurable degree of recognition at all with a discernible majority of the Supreme Court remains to be seen.

The "Future" Majority

Let us assume that Justice O'Connor, in her concurring opinion, speaks for the future majority of the Supreme

Court on this issue. How will a case like that before us be viewed? We, of course, embark upon a rather speculative venture at this point. I submit that speculation to the effect that the balance will be struck in favor of the child witness is highly illusory.

As I see it, the majority opinion has stressed two factors which distinguish the case before us from that before the Justices in *Coy*. 1. We are not faced with a statute, regulation or rule which permits certain prosecution witnesses to be shielded from eye-to-eye contact with an accused without a determination of necessity by the military judge. 2. The military judge in this case made findings of fact and concluded that allowing the two child witnesses to testify with their backs to the appellant, so as to avoid direct eye contact, was necessary. If this approach were to be found sufficient *per se* to overcome an accused's right to confrontation, such disposition would signal a radical retreat from the essence of *Coy*. When the military judge's findings are examined critically they say little more than that the child witnesses would experience less anxiety and, thus, could testify more readily if they were to avoid direct eye contact with the appellant. That, in my view, is not sufficient.

I do not write to demean the findings that the military judge made in this case. With the judicial guidance available at the time of trial I can easily envision that I would have made similar findings in support of the same ruling. However, we are now looking at a constitutional principle that has been significantly refocused. We cannot evaluate that which occurred at trial in light of what the law appeared to be at that time; we must apply the law as it is now. When the majority affirm the military judge's action in this case they announce that the "exception" to *Coy* has virtually engulfed the constitutional rule stated therein

insofar as Air Force practice is concerned. The irony is that *Coy*, as so viewed, becomes a vehicle for protecting the emotional interests of child victims at trial. This is a very worthy goal. However, it is worth repeating that its enunciation by this Court makes for very bad constitutional law.

The majority opinion, in attempting to develop the outlines of an exception to the result in *Coy*, discusses three factors that are worthy of consideration. One of the victims in this case suffered from a stuttering problem which was likely to manifest itself under anxiety and stress. This condition, as described by the expert witness, might well interfere with the child's capacity to think properly and, thus, could impair his ability to provide meaningful testimony. It is also noteworthy that the appellant, unlike the defendant in *Coy*, occupied a position *in loco parentis* to the victims and had exercised considerable control and influence over them. The victims might be expected to be greatly intimidated by being in direct eye contact with him when they testified. The majority opinion also mentions that the witnesses were repeatedly beaten by the appellant during the commission of the offenses. The psychologist who testified in support of the prosecution motion did not allude to physical violence visited upon the child victims in her testimony, but the military judge had access to exhibits which contained references to certain beatings. We do not know the extent to which any of these factors influenced the military judge's ruling because his findings do not so indicate. In the absence of more particularized findings of necessity by the military judge, I am not willing to say that the ruling in this case can be sustained as an exception to the appellant's right of confrontation. See Justice O'Connor's concurring opinion in *Coy*, 108 S.Ct at 2805.

I believe that it is also necessary that we critically examine the testimony of the psychologist. It appears likely that her recommendation for shielding the child witnesses from the direct gaze of the appellant was not greatly influenced by the specific factors set forth above. As the majority opinion notes, she acknowledged on cross-examination her general preference that her child clients be permitted to testify without having to confront their accused assailants. Her opinion was based in part on the view that children as a class experience extreme anxieties when they have to provide testimony in sexual abuse cases. This is undoubtedly a valid point of view and one that is hardly surprising coming from an individual involved in therapeutic treatment of abused children. It would be surprising, indeed, if a child psychologist were to express a contrary view concerning a patient in therapy. However, a premise this broad makes for a broad rule. Is the Court today holding that an accused's right to confrontation in a given case is determined by what is emotionally feasible and sound for the welfare of child witnesses undergoing therapy? That is truly a broad rule.

Military judges faced with a proposition such as I have posited above are administering something other than justice. I submit that we invite them to administer a discipline for which they are neither equipped nor trained. Or, to put the shoe on the other foot, it is the therapists who will ultimately be charged with the administration of an important aspect of due process in Air Force courts-martial?

A Caveat: What of Trials with Members?

In my view, the most essential finding made by the military judge was the following: "One, such a [sic] arrangement will not have any effect on the Court with

regard to the presumption of innocence of the accused; . . ." What might the military judge have found in this regard if this had been a trial before members rather than the military judge, sitting alone? I fear that an arrangement to shield or move witnesses to a position where they might avoid direct eye-to-eye contact with an accused will be difficult to handle without significant risk of prejudice in a trial before members. Any method that is employed is surely going to be obvious to the members. Does such an arrangement convey an unmistakable message that someone in a position of authority, presumably the military judge, has determined that the accused has caused grievous physical or psychological harm or that he otherwise represents a danger to the child witness or witnesses who appear to testify? These may be legitimate aggravation considerations, but at an appropriate point in the trial once the issue of guilt has been properly determined. Might the potential for prejudice arising from such a situation be alleviated by appropriate instructions? I assume that we may have occasion to address that issue in due course.

APPENDIX B

APPENDIX B

U.S. COURT OF MILITARY APPEALS

No. 63,283
ACM 26797

UNITED STATES, APPELLEE

v.

JOHN A. THOMPSON, SERGEANT,
U.S. AIR FORCE, APPELLANT

Argued March 5, 1990
Decided Sept. 25, 1990

Accused, a sergeant in the United States Air Force, was convicted by general court-martial, Stephen R. Bloss, J., of sexually abusing his two stepsons and he appealed. The United States Air Force Court of Military Review, 29 M.J. 541, affirmed. The United States Court of Military Appeals, Cox, J., held that accused's due process and confrontation rights were not violated when court allowed his two sons to testify with their backs to him, while facing the judge and counsel.

Affirmed.

Everett, C.J., filed a concurring opinion.

Sullivan, J., filed an opinion concurring in the result.

For Appellant: *Major Ronald G. Morgan* (argued); *Colonel Richard F. O'Hair* (on brief).

For Appellee: *Major Terry M. Petrie* (argued); *Colonel Robert E. Giovagnoni, Major Paul H. Blackwell, Jr., Captain David G. Nix* (on brief); *Colonel Joe R. Lamport.*

OPINION OF THE COURT

Cox, Judge:

This case calls upon us to decide:

> WHETHER APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WHEN THE CHILD WITNESSES WERE PERMITTED, AT TRIAL, TO TESTIFY AGAINST APPELLANT WITH THEIR BACKS TO HIM.

Appellant, a sergeant in the United States Air Force, was convicted of sexually abusing his two stepsons.[1] Specifically, he sodomized the two boys, M and F, ages 7 and 10 respectively, by frequent anal intercourse and by requiring the boys to commit fellatio, on numerous occasions from September 1984 until September 1985. He was also found guilty of sodomizing M in late November 1985. As a result of the sexual abuse, each child suffered permanent rectal injury.[2] At the time of trial, some 2-and-½

[1] Appellant was tried by general court-martial before a military judge alone. Contrary to his pleas, he was found guilty of sodomy with a child under the age of 16 and assault on a child under the age of 16, in violation of Articles 125 and 128, Uniform Code of Military Justice, 10 USC §§ 925 and 928, respectively. His sentence to confinement for 30 years, total forfeitures, reduction to pay grade E-1, and a dishonorable discharge was approved by the convening authority. The Court of Military Review affirmed the findings and sentence. 29 MJ 541 (1989) (en banc).

[2] Appellant was also convicted of assault and battery on his wife on divers occasions during this same time period.

years after the episodes, the children were being treated by a psychologist for psychological and emotional trauma resulting from the incidents.

Before the court-martial began, trial counsel proposed having the boys testify, not from the witness stand next to the military judge, where they would face appellant, but instead from a chair in the center of the courtroom, with their backs to appellant. The chair was positioned such that the boys could see and be seen by the military judge, trial counsel, and defense counsel. However, they could not see or be seen by appellant face-to-face. Defense counsel objected to this procedure on the ground that the arrangement violated appellant's Sixth Amendment right to confront his accusers.

In aid of his proposal, trial counsel offered the testimony of Ms. Linda Sweeney-Frawley, a psychologist. After Ms. Sweeney-Frawley was accepted as an expert witness in the area of child sexual abuse, the following colloquy took place between her and trial counsel:

> Q. Do you have an opinion as to how . . . [the boys] should come in here? Let me rephrase that. In terms of the set up of this courtroom, do you have an opinion as to whether or not they would be able to sit where you're sitting and tell what allegedly happened to them?
>
> A. I think that that would present a problem for the children who have a great deal of anxiety and fear about participation in this proceeding. *And they spontaneously talked with me last week about their fear of being in the courtroom with Mr. Thompson, and talked about a fear that they might even be attacked by him in the courtroom. The boys enter these proceedings having stated a great deal of anxiety and shame and fear about participation. Attempts have*

been made to help them to modulate that fear and to provide them with feelings of greater safety in being in this room and participating in the proceedings. However, both of the children will have difficulty in talking about their experience that they have identified in terms of being in a more public setting and being in front of strangers and for them to be in direct line of vision with defendant in this case, (continuing) I think, would tend to block their ability to respond and to think about the questions. There's a great deal of anxiety and it's easy to be distracted by what is in your line of vision rather than to be able to respond to the questions that are asked. *I think that their being in the direct line of vision with the defendant will impair their ability to talk about their experiences and to actively think about the questions that they're responding to.*

Q. *What is your opinion about repositioning the witness stand so that perhaps they might be facing the Judge and their back turned toward the accused?*

A. *I think that that would lessen their anxiety and would be less likely to produce blocks in their intellectual capacity to respond to questions if they do not have Mr. Thompson in their direct line of vision.*

(Emphasis added.)

Based upon the witness' testimony, the military judge made the following findings and ruling:

MJ: The defense has objected to the prosecution's proposal that . . . [the victims] testify not from the witness stand but while seated in a chair facing the witness stand and the military judge. . . .

Trial counsel has presented evidence through Linda Ann Sweeney-Frawley that the children if required to testify from the witness stand where they would be

looking directly at the accused would have their ability to think and testify accurately impaired and that they could respond better if the accused were not in their direct line of sight, and I find by a preponderance of the evidence that that's a fact.

I further find that:

One, such a[n] arrangement will not have any effect on the Court with regard to the presumption of innocence of the accused;

Two, that the arrangement proposed by trial counsel is in no way obtrusive and certainly not comparable with the arrangements in *Coy v. Iowa* cited by defense counsel; [3]

Three, the accused and witnesses will be in the same room with no barrier between them and the fact that the witnesses will not be facing the accused will not deprive the accused of his right to confrontation;

Four, *considering the testimony concerning the trauma to the children if forced to testify facing the accused, and balancing that factor against the accused's alleged right to have witnesses facing him, I find the procedure proposed by the trial counsel will not prejudice the rights of the accused and will insure the witnesses testify freely.*

The objection is therefore overruled.

(Emphasis added.)

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[3] Between the time of trial and the issuance of the Court of Military Review decision in this case, the United States Supreme Court decided *Coy v. Iowa*, 487 U.S. 1012, 1020-22, 108 S.Ct. 2798, 2803, 101 L.Ed.2d 857 (1988). *Maryland v. Craig*, 497 U.S. ____, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), a recent case construing *Coy*, had yet to be decided. Nevertheless, the Court of Military Review correctly forecast the direct, ultimate rule of law dealing with child-witnesses and confrontation.

The case was appealed to the Court of Military Review pursuant to Article 66(c), Uniform Code of Military Justice, 10 USC § 866(c), which empowers that court to make factual findings. The en banc court found:

> In the present case, the information presented to the judge indicated that the witnesses were young and frightened of testifying. The psychologist testified that their fright was not just a generalized stage fright, but was also a fear of being physically attacked by the appellant. Many witnesses may harbor a fear of being attacked for their adverse testimony, but these children had already been repeatedly beaten by the appellant during his commission of the offenses for which he was being tried. Their fear was based on their actual knowledge of the physical harm he was capable of inflicting. The psychologist also testified that both boys, and particularly the younger one, were likely to be so confounded by facing the appellant directly that their mental capabilities might be blocked, rendering them incapable of testifying.

29 MJ 541, 545 (1989).

The Court of Military Review then determined that an accused's right "to be confronted with the witnesses against him," U.S. Const., amend. VI, may give way if it is necessary to protect a child witness. Ultimately that court found:

> The military judge's inquiry was adequate to satisfy *Coy* and to justify the particular steps taken to accommodate the fears of the child witnesses in this case. . . .

Id. at 545.

We are called upon to decide whether, under these circumstances, appellant was denied his right "to be confronted with the witnesses against him," endowed upon us

all by the Constitution of the United States. For the reasons stated herein, we conclude that he was not denied the right to confrontation.

In *Coy v. Iowa,* 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988), the Supreme Court examined the constitutional validity of a state statutory procedure which permitted child-sexual-abuse victims to testify at trial from behind a screen blocking the defendant from their sight, but allowing him "dimly to perceive" them and to hear their testimony. *Id.* at 1015, 108 S.Ct. at 2799. Writing for the majority, Justice Scalia stated that "the irreducible literal meaning of the [Confrontation] Clause [is the] 'right to *meet face to face* all those who appear and give evidence *at trial.*' " *Id.* at 1021, 108 S.Ct. at 2803, *quoting California v. Green,* 399 U.S. 149, 175, 90 S.Ct. 1930, 1943, 26 L.Ed.2d 489 (1970) (Harlan, J., concurring). Because Coy was not allowed to see his accusers "face to face" at trial, such a procedure violated his Sixth Amendment right to confrontation. The majority also stated:

> We leave for another day, however, the question whether any exceptions exist [to this meaning of the Confrontation Clause]. Whatever they may be, they would surely be allowed only when necessary to further an important public policy. . . . Since there have been no individualized findings that these particular witnesses needed special protection, the judgment here could not be sustained by any conceivable exception.

Id., 487 U.S. at 1021, 108 S.Ct. at 2803.

Justice O'Connor, with whom Justice White joined, concurred in a separate opinion, stating:

> There is nothing novel about the proposition that the Clause embodies a general requirement that a witness face the defendant. . . . But it is also not novel to

> recognize that a defendant's "*right physically to face those who testify against him,*" . . . *is not absolute* and . . . [we] reject any suggestion to the contrary in the Court's opinion. . . . In short, our precedents recognize a right to face-to-face confrontation at trial, but have never viewed that right as absolute. . . .
>
> Thus, I would permit use of a particular trial procedure that called for something other than face-to-face confrontation if that procedure was necessary to further an important public policy. . . . The protection of child witnesses is, in my view and in the view of a substantial majority of the States, just such a policy. . . . But if a court makes a case-specific finding of necessity, as is required by a number of state statutes, . . . our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses. Because nothing in the Court's opinion conflicts with this approach and this conclusion, I join it.

487 U.S. at 1024-25, 108 S.Ct. at 2804-05 (citations omitted; emphasis added).

Subsequently, by its decision in *Maryland v. Craig*, 497 U.S. ____, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), the Supreme Court has made it abundantly clear that the right to confrontation does not guarantee criminal defendants the *absolute* right to face-to-face meetings with the witnesses against them at trial. There the Court stated:

> In sum, our precedents establish that "the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial," a preference that "must occasionally give way to considerations of public policy and the necessities of the case."

Id. at 3165, *citing Ohio v. Roberts*, 448 U.S. 56, 63, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597 (1980) (emphasis

added); and *Mattox v. United States,* 156 U.S. 237, 243, 15 S.Ct. 337, 340, 39 L.Ed. 409 (1895).[4]

Moreover, confrontation

> includes not only a "personal examination," . . . but also "(1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." [*California v.*] *Green,* 399 U.S. at 158 [90 S.Ct. at 1935] (footnote omitted)

Maryland v. Craig, supra, 110 S.Ct. at 3163.

At issue in *Craig* was the constitutionality of a Maryland statutory procedure permitting a child witness in a sexual abuse case to testify via one-way closed circuit television, where the child would be questioned by the prosecutor and defense counsel in a room separate from the courtroom. The judge, jury, and defendant remained in the courtroom where the testimony was displayed.

The Court answered the question regarding the possibility of exceptions which it had reserved in *Coy* as follows:

> [A] State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court.

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[4] For the contrary view, *see Maryland v. Craig, supra* at 3171-76 (Scalia, J., dissenting).

Maryland v. Craig, supra at 3167. The Court noted that "to the extent the child witness' testimony may be said to be technically given out-of-court (though we do not so hold), these assurances of reliability and adversariness are far greater than those required for admission of hearsay testimony under the Confrontation Clause." *Id.* at 3167. *See also Ohio v. Roberts,* 448 U.S. at 66, 100 S.Ct. at 2539. The Court also held, however, that whenever the prosecution proposes a procedure which deviates from face-to-face confrontation in order to protect the welfare of the particular child-witness who seeks to testify, there must "be a case-specific" "finding of necessity" by the trial court in order to allow the procedure. *Id.*, 110 S.Ct. at 3169.[5]

Measured against these standards for child-sexual-abuse victims testifying at trial, we are convinced, in this particular case, that allowing the two boys to testify with their backs to appellant did not violate his rights under the Sixth Amendment.

The procedure used in the case now before us provided these same "safeguards of "reliability and adversariness"

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[5] The Supreme Court vacated and remanded the decision from the Maryland Court of Appeals, because it appeared that the state court required that the child witness first be questioned in the presence of the defendant to determine if the child-witness would suffer such emotional distress that reasonable communication would not be possible. The Supreme Court

> decline[d] to establish, as a matter of federal constitutional law, any such categorical evidentiary prerequisites for the use of the one-way . . . procedure. The trial court in this case, for example, could well have found, on the basis of the expert testimony before it, that testimony by the child witnesses in the courtroom in the defendant's presence "will result in [each] child suffering serious emotional distress such that the child cannot reasonably communicate," . . .

Maryland v. Craig, supra, at 3171 (citations omitted).

Maryland v. Craig, supra at 3166 (emphasis added). *See also Ohio v. Roberts,* 448 U.S. at 66, 100 S.Ct. at 2539. First, the record shows that the children understood the solemnity of the oath to testify truthfully. Second, appellant had every opportunity to rigorously cross-examine them as to their testimony. Wigmore has stated:

> (1) The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.* The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.

5 Wigmore, Evidence § 1395 at 150 (Chadbourne rev. 1974); *see also Coy v. Iowa,* 487 U.S. at 1029, 108 S.Ct. at 2807 (Blackmun, J., dissenting) ("There never was at common law any recognized right to an indispensable thing called confrontation *as distinguished from cross-examination.*"), *quoting* 5 Wigmore, *supra* § 1397 at 158.

Third, the military judge, as factfinder in a small courtroom, was able to observe the boys' demeanor and assess their credibility. We are, therefore, convinced that the procedure used in this case to protect the child-witnesses did "not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause." *Maryland v. Craig,* 110 S.Ct. *supra* at 3167.

Fourth, and most importantly, both the military judge and the Court of Military Review specifically found that the procedure utilized to protect the children was *necessary. Maryland v. Craig, supra,* at 3165. After careful review of the psychologist's testimony, the military judge's rulings, and arguments of counsel, we likewise are convinced that the procedure used here (seating each child-

witness with his back towards appellant while testifying at trial) by the military judge did not violate appellant's right of confrontation.[6]

The decision of the United States Air Force Court of Military Review is affirmed.

EVERETT, Chief Judge (concurring):

In *Coy v. Iowa*, 487 U.S. 1012, 1016, 108 S.Ct. 2798, 101 L.Ed.2d 857, 864 (1988), Justice Scalia, writing for the Court, stated:

> We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.

Accepting that proposition – which seems to conform to the language of the Sixth Amendment – I would see no choice but to agree with the dissent of Senior Judge Lewis in the court below (29 MJ 541, 546-48) and to vote for reversal of appellant's conviction. Clearly, Thompson was not allowed a "face-to-face meeting" with the two children who testified against him.

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[6] Although not raised on appeal, there is also the question of whether such a procedure violates an accused's right to due process, in that it creates undue prejudice when the trier of fact sees the witness testify with his back to the accused, possibly inferring guilt. Because the case was tried before a military judge alone, we are confident that the judge drew no such inference of guilt from seeing the children testify with their backs to appellant. *See finding one, 31 MJ at 170. We leave the question for another day whether such a procedure would be prejudicial if used in front of members. Although the same issue was raised in Coy v. Iowa, supra,* the Supreme Court found it unnecessary to reach the due process claim because the denial of face-to-face confrontation was held to constitute reversible error.

However, in *Maryland v. Craig*, 497 U.S. ____, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), the Supreme Court, over a strong dissent by Justice Scalia and three other Justices, has provided new guidance. As I read *Craig*, a defendant's right to confront a witness face-to-face must yield under some circumstances to the State's interest in the welfare of a child-accuser. However, this curtailment of the defendant's right seems to have been authorized only if literal confrontation will cause such emotional trauma that the child cannot reasonably communicate information to the trier of fact. Moreover, the judge may not allow any alternative to face-to-face confrontation unless he has made a specific inquiry and entered appropriate, case-specific findings based on the evidence before him.[1]

When I match appellant's case with *Craig*, I conclude that here the testimony of the two child-witnesses was properly received. Admittedly, a Maryland statute—which parallels laws enacted in many other states—specifically authorized use of closed circuit television when "testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate."[2] On the other hand, neither the Uniform Code of Military Justice nor the Manual for Courts-Martial contains any similar grant of authority.[3] However, I conclude that, even in the absence

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[1] However, in *Craig*, the Supreme Court refused to require that the trial court "observe the children's behavior in the defendant's presence." 110 S.Ct. 3157, 3171.

[2] Section 9-102 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland (1989), *quoted in Craig*, 110 S.Ct. at 3161 n.1.

[3] Several years ago I proposed that the Joint-Service Committee on Military Justice consider the desirability of a Manual provision dealing with this general subject; and I still believe this might be worth pursuing.

of a statutory provision or a rule of court, a military judge had inherent authority to dispense with face-to-face confrontation of a child-witness who otherwise will suffer emotional distress that will prevent the child from testifying meaningfully.

In *Craig*, the Supreme Court made clear that the trial judge must inquire carefully to determine whether there is a pressing need to shield a child-witness from a "face-to-face meeting" with the defendant. Here, the military judge heard testimony from an expert, who had been treating the two children over a long period of time; and thereafter he entered relevant findings. Although I would have preferred that the findings be more specifically addressed to the questions with which the majority in *Craig* was concerned, I believe the findings in this case were adequate to justify curtailment of Thompson's right to a "face-to-face meeting" with the two children.[4]

The Government did not seek to utilize closed circuit television, as was done in *Craig*. In one respect, this benefited appellant, because the children were in the same courtroom with him and they could be observed directly by the factfinder as they testified. On the other hand, the placement of the children when they testified may have tendered to suggest that appellant was guilty and that the children were justifiably fearful of him. The trial was by a judge alone; and the judge specifically found that the special seating arrangment during the testimony of the two children would not affect the presumption of innocence to which Thompson was entitled. Under these circumstances, I believe appellant was adequately protected.[5]

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[4] Of course, at the time of the trial, the military judge did not have the benefit of the *Craig* opinion.

[5] In a trial by court members, it will be especially important for a military judge to consider the risk that the members may infer guilt

SULLIVAN, Judge (concurring in the result):

The military judge was presented with an adequate basis for his ruling and entered *case-specific* findings to support the procedure used here. *See Maryland v. Craig*, 497 U.S. ____, ____, 110 S.Ct. 3157, 3169, 111 L.Ed.2d 666, 685 (1990). Nonetheless, I would note that the children's testimony was cumulative in light of the psychologist's unchallenged hearsay repetitions of their descriptions of sexual abuse inflicted on them by appellant. Accordingly, were to I assume, *arguendo*, that the procedure used in this case did not meet the strict requirements of *Maryland v. Craig, supra*, I would nevertheless conclude that harmless error had occurred here. *See Coy v. Iowa*, 487 U.S. 1012, 1021-22, 108 S.Ct. 2798, 2803, 101 L.Ed.2d 857 (1988).

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because of the location of a child-witness during his testimony. The judge should be careful to preclude such an inference by giving appropriate instructions.

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